No. 04-1736

# In the Supreme Court of the United States

DAN ENRIGHT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the district court erred in denying petitioner relief under 28 U.S.C. 2255 on his claim that he received ineffective assistance of counsel.

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## OPINIONS BELOW

The order of the court of appeals denying petitioner's motion for a certificate of appealability (Pet. App. 1a-2a) is unreported. The opinion of the district court (Pet. App. 3a-20a) is reported at 347 F. Supp. 2d 159.

## JURISDICTION

The judgment of the court of appeals was entered on March 24, 2005. The petition for a writ of certiorari was filed on June 22, 2005. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of one count of conspiring to defraud the United

States and to commit tax evasion, 26 U.S.C. 7201, wire fraud, 18 U.S.C. 1343, and money laundering, 18 U.S.C. 1957, in violation of 18 U.S.C. 371; fourteen counts of attempting to evade federal motor fuel excise taxes, in violation of 26 U.S.C. 7201; eleven counts of wire fraud, in violation of 18 U.S.C. 1343; eleven counts of money laundering, in violation of 18 U.S.C. 1957; and one count of evading currency reporting requirements, in violation of 31 U.S.C. 5316 and 5322. Petitioner was sentenced to 200 months of imprisonment and was ordered to pay $1 million in restitution. Pet. App. 4a-5a. The court of appeals affirmed, 46 Fed. Appx. 66 (3d Cir. 2002), and this Court denied certiorari, 537 U.S. 1044 (2002).

Petitioner then sought relief under 28 U.S.C. 2255. The district court denied petitioner's motion under Section 2255, Pet. App. 3a-20a, and the court of appeals denied a certificate of appealability, *id.* at 1a-2a.

1. Petitioner and his co-conspirators participated in a "daisy chain" scheme to evade over $132 million in federal excise taxes on the sale of certain kinds of fuel, including diesel fuel and gasoline. Before and during the execution of the scheme, Enright was president of PetroPlus Oil (PetroPlus), a company that bought and sold motor fuel. Petitioner and his co-conspirators made it appear as if excise taxes owed on motor fuel bought by PetroPlus had been paid by other entities. Neither those entities nor PetroPlus, however, in fact paid the taxes. Pet. App. 5a; Gov't C.A. Br. 3, 6-18.[1]

a. During the prosecution period, 1989 through 1995, the Internal Revenue Code imposed a tax on "the sale of any taxable fuel by the producer or the importer thereof

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[1] "Gov't C.A. Br." refers to the government's brief in petitioner's direct appeal from his conviction, No. 99-5144 (3d Cir.).

or by any producer of a taxable fuel." 26 U.S.C. 4091(a) (1988). "Taxable fuel" included diesel fuel. 26 U.S.C. 4092(a)(1)(A) and (2) (1988). Diesel fuel is "number two oil," which can be used both as motor fuel and as home heating oil. From 1989 to 1995, neither the federal government nor the State of New Jersey imposed an excise tax on the sale of number two oil used as home heating oil. On taxable sales of motor fuel, the federal excise tax rate ranged from 15 cents to 20.1 cents per gallon. The State of New Jersey, during a part of the prosecution period, imposed an additional excise tax and a gross receipts tax on taxable sales of number two oil. Gov't C.A. Br. 4.

Under the motor fuels excise tax system, wholesale fuel distributors holding valid Internal Revenue Service Registrations for Tax-Free Transactions (Form 637) were permitted to make tax-free sales to and tax-free purchases from other Form 637 holders. The last wholesaler in the distribution chain with a Form 637 was responsible for the payment of the excise tax. Pet. App. 5a.

b. Petitioner and his co-conspirators established a series of false middlemen and sham transactions to make it appear as if PetroPlus was purchasing fuel with the taxes included in the sales price. In reality, PetroPlus purchased fuel directly from Kings Motor Oils (Kings) without the taxes being paid by either company. Kings, a Form 637 holder, made paper sales to middle companies without taxes being paid. Some of those companies were legitimate businesses with valid Forms 637, and others were mere shell companies. The false transactions often went through several layers of middle companies in order to obscure which company was responsible for payment of the taxes. One shell company (the

"burn" company) was always positioned between Kings and PetroPlus, and any sales before that company in the chain were invoiced as tax-unpaid, while any sales after it (including to PetroPlus) were invoiced as tax-paid. Kings and PetroPlus thereby remained several degrees removed from the sale that, on paper, triggered the obligation to pay taxes. Pet. App. 5a.

Petitioner and his co-conspirators concealed their scheme through elaborate measures. They used cellular phones purchased and activated in the names of other companies, they prepared false invoices, they made payments for the fuel through sham companies, and they incorporated into the "daisy chain" sham satellite offices of legitimate fuel suppliers as well as at least eight shell companies holding invalid or stolen Form 637s. Pet. App. 6a.

2. a. Before trial, petitioner was represented by Creed Black and Peter Bennett. Bennett's firm represented petitioner at trial. Pet. App. 6a.

Petitioner's defense sought to create reasonable doubt concerning whether PetroPlus in fact was the taxpayer and whether petitioner had acted willfully. With respect to the issue of willfulness, petitioner asserted that he did not know PetroPlus was the taxpayer. Petitioner's counsel, Bennett, repeatedly and unsuccessfully argued that the government was required to prove that petitioner knew that PetroPlus was the company responsible for paying the excise taxes. Bennett proposed jury instructions to that effect. The trial culminated with petitioner's admission, on the stand, that he knew that the excise taxes were not being paid for the fuel purchased by PetroPlus. Pet. App. 6a-7a.

b. The court of appeals affirmed. *United States* v. *Enright*, 46 Fed. Appx. 66 (3d Cir.), cert. denied, 537

U.S. 1044 (2002). Petitioner was represented by new counsel (his current counsel) on appeal. Petitioner renewed his contention that he could not be convicted unless he knew PetroPlus was required to pay the excise taxes at issue. In rejecting petitioner's argument, the court of appeals explained that, "what the government had to prove was that PetroPlus was the taxpayer, not that [petitioner] knew that PetroPlus was the taxpayer." *Id.* at 70. As a result, the court reasoned, a "belief that someone other than PetroPlus owed the taxes did not constitute a defense to the crimes charged in the superseding indictment." *Ibid.* The court observed that petitioner "testified that he knew the taxes had not been payed," and the court found "ample evidence in the record from which a reasonable jury could infer that [petitioner] acted willfully to evade the taxes." *Id.* at 71.

3. On November 26, 2003, petitioner filed a motion in the district court under 28 U.S.C. 2255, alleging that he had received ineffective assistance of counsel. Petitioner contended that trial counsel, Bennett, had wrongly advised him concerning what the government was required to prove in order to establish that petitioner had acted "willfully" in evading the payment of taxes. According to petitioner, counsel had erroneously advised him that the "willfulness" standard required the government to prove that he knew that PetroPlus was responsible for the payment of excise taxes on its purchases, a legal position that had been rejected by the court of appeals. Petitioner alleged that, as a result of Bennett's erroneous advice, petitioner had rejected a plea overture from the government. Pet. App. 9a-10a.

4. The district court denied petitioner's Section 2255 motion. Pet. App. 3a-20a.

a. The court first determined that petitioner was not prejudiced by Bennett's alleged misunderstanding of the willfulness requirement. Pet. App. 12a-15a. The court explained that, to establish prejudice, petitioner was required to show that the government had extended a plea offer and that there is a reasonable probability that petitioner would have accepted the offer (and that the court would have approved the plea agreement). The court observed that it was "undisputed that there was no formal plea offer extended by the government" in this case. *Id.* at 12a. In the court's view, there would have been a "closer question if the plea discussions had advanced to a more formal stage, yet still short of a written offer." *Id.* at 13a. But the brief and informal telephone exchange between the prosecutor and petitioner's counsel—in which counsel had asked the prosecutor to give a sentencing range for a possible plea agreement but there was no discussion of the charges to which petitioner would plead guilty—"was no more than perfunctory." *Ibid.*

The court further explained that, "[e]ven if a formal plea offer had been made," petitioner "cannot demonstrate that there was even a reasonable probability he would have accepted." Pet. App. 13a. The court reasoned that petitioner's defense at trial was not limited to an argument that he lacked knowledge that PetroPlus was the taxpayer, but it also consisted of a claim that PetroPlus was "not *in fact* the taxpayer." *Ibid.* The latter claim was unaffected by any erroneous advice from petitioner's trial counsel concerning the issue of willfulness. *Ibid.*

In addition, the district court explained, there was "ample evidence from which the jury could *infer* that [petitioner] knew that PetroPlus was the taxpayer."

Pet. App. 14a. In "light of the overwhelming evidence against" petitioner, the court concluded that petitioner's "suggestion that his decision whether to pursue a plea bargain was determined by counsel's mischaracterization of the government's burden and his personal belief that he did not know that PetroPlus was the taxpayer is not credible." *Ibid.* The court explained that petitioner "offered nothing more than a statement that he would have pled guilty," and that he was required to support his claim with "more than a bare allegation." *Ibid.*[2]

b. The district court also determined that petitioner had failed to demonstrate that his trial counsel's performance was deficient. Pet. App. 15a-20a. According to the court, petitioner's "suggestion that he believed that the government needed to prove he knew that PetroPlus was the taxpayer as a result of advice he received from Bennett is simply not credible." *Id.* at 16a. The court explained that petitioner was concerned with the issue of willfulness before his indictment and trial, and that, "[i]nstead of seeking a legal opinion as to the dictates of the law, [petitioner] pushed his lawyers to craft their interpretation of the law to suit his needs." *Id.* at 18a. In addition, petitioner had consulted with lawyers, the IRS, and the State of New Jersey's "equivalent agency in his attempts to provide cover for his position," indicating "that he knew or was advised about the fine line of the law on the issue of willfulness." *Id.* at 17a.

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[2] The district court also observed that petitioner "still does not accept or acknowledge the significant evidence of his involvement in a conspiracy to evade taxes," and that the court could not have accepted a plea agreement without a sufficient allocution to the facts alleged in the indictment. Pet. App. 15a.

The court determined that, in light of its "doubts regarding [petitioner's] account of the advice given him by Bennett," the court could not "conclude that Bennett's performance was deficient." Pet. App. 18a. The court observed that the "suggestion that Bennett provided erroneous legal advice is contradicted by the evidence that [petitioner] himself dictated legal strategy to his lawyers * * * well before Bennett became involved with his case." *Ibid.* The court explained that "Bennett's overall performance throughout the trial illustrates that he was not ill-informed nor did he misunderstand the applicable law." *Id.* at 19a. The court found that petitioner's allegations were "not enough to overcome the presumption of reasonableness accorded counsel by" *Strickland* v. *Washington*, 466 U.S. 668 (1984).

5. The court of appeals denied petitioner a certificate of appealability, concluding that petitioner had failed to make a substantial showing of the denial of a constitutional right. Pet. App. 1a-2a; see 28 U.S.C. 2253(c)(2).

**ARGUMENT**

Petitioner argues (Pet. 13-16) that the district court erred in denying his claim of ineffective assistance of counsel. That fact-bound contention lacks merit and does not warrant review.

1. The district court determined (Pet. App. 12a-15a) that petitioner had failed to demonstrate that he was prejudiced by his counsel's allegedly erroneous advice. The court explained that, to establish prejudice, petitioner was required to demonstrate that the government extended a plea offer and that there is a reasonable probability that he would have accepted the offer. *Id.* at

12a. The court found that petitioner had failed to satisfy either of those requirements.

Petitioner contends (Pet. 13, 16) that the district court erred in conditioning his ability to demonstrate prejudice on the existence of a "formal" plea offer. The district court, however, did not rest its prejudice holding on the absence of a "formal" plea offer. Although the court observed that it was undisputed that no formal plea offer had been made, Pet. App. 12a, the court explained that "no specific offer was made *even informally*," *id.* at 13a (emphasis added), and that there was no discussion of the "details of the charges [petitioner] would plead to or the facts to which he would allocute," *ibid.* The court characterized the brief discussion between the prosecutor and trial counsel on a potential plea as "no more than perfunctory." *Ibid.* In addition, the court determined that, "[e]ven if a formal plea offer had been made, [petitioner] cannot demonstrate that there was even a reasonable probability he would have accepted." *Ibid.* The district court therefore did not rest its decision on the absence of a formal plea offer, and it did not hold that a formal plea offer was required to demonstrate prejudice.[3]

2. Petitioner argues (Pet. 16-17) that, because his trial counsel misunderstood the law of "willfulness," the district court should not have applied a presumption that counsel's performance was reasonable. There is no warrant for reviewing that claim for the threshold reason that, in light of the district court's ruling that petitioner failed to demonstrate prejudice, the court's dis-

[3] Accordingly, there is no merit to petitioner's assertion (Pet. 13, 16) that the district court's (supposed) requirement of a formal plea offer conflicts with the Second Circuit's decision in *United States* v. *Gordon*, 156 F.3d 376 (1998).

cussion of counsel's performance was not necessary to the decision. See *Strickland*, 466 U.S. at 697 (explaining that courts need not address counsel's performance "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so").

In addition, the district court did not accept petitioner's assertion that he misunderstood the meaning of "willfulness" because of the allegedly erroneous advice given to him by Bennett. The court instead concluded that petitioner's "suggestion that he believed that the government needed to prove he knew that PetroPlus was the taxpayer as a result of advice he received from Bennett is simply not credible." Pet. App. 16a; see *id.* at 18a ("Given this Court's doubts regarding [petitioner's] account of the evidence given him by Bennett, this Court cannot conclude that Bennett's performance was deficient."). The court further explained that the "suggestion that Bennett provided erroneous legal advice" was "contradicted by the evidence that [petitioner] himself dictated legal strategy to his lawyers * * * well before Bennett became involved with his case." *Ibid.*; see *id.* at 16a ("[I]t appears that [petitioner's] belief that the government needed to prove that he knew PetroPlus was the taxpayer *predates* any advice given to him by Bennett, and in fact, predates Bennett's involvement in the case."). This case thus presents no occasion for determining whether or how a presumption of reasonable performance applies when there has been a finding that the attorney misunderstood the law.[4]

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[4] Contrary to petitioner's assertion (Pet. 17), the district court did not hold that Bennett's diligence would excuse mistaken advice that he might have given. While the court observed that petitioner had not alleged that "Bennett's supposed mistake of law was due to a lack of

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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investigation or diligence," Pet. App. 16a, the court did not suggest that Bennett's diligence would excuse any mistake of law on his part.